Overview of COVID-19 Law and Guidance for Health and Welfare Plans

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The COVID-19 pandemic has significantly affected the business operations of small and large employers alike. To mitigate the harm from the pandemic to employers, the government has enacted major legislation and issued numerous guidance in the past few months pertaining to COVID-19, including rules that address various aspects of employee benefits.

This article provides an overview of significant COVID-19 legislation and guidance related to employer-sponsored health and welfare benefit plans that has been enacted or issued to date.

Some of these changes are mandatory for group health plans. Other are optional. Employers should carefully review these rules to determine any compliance obligations as well as any opportunities to benefit their businesses and respective employees.

SHRM Member-Exclusive Resource Spotlight
Coronavirus and COVID-19
Mandated Coverage of COVID-19 Testing (Mandatory)

Effective March 18, 2020 and until the end of the national emergency period for COVID-19, the Families First Coronavirus Response Act (FFCRA) requires group health plans to cover:

> COVID-19 diagnostic testing.
>
> Certain items and services that result in an order for, or administration of, the testing.

Plans must provide this coverage without imposing any requirements for cost-sharing, prior authorization, or medical management.

CARES Act

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which was signed into law on March 27, 2020, amended the FFCRA's coverage mandate to:

> Expand the scope of COVID-19 diagnostic tests that must be covered.

Include rules regarding the rate at which a plan must reimburse a health care provider for the mandated services.

Require coverage of preventive services and vaccines for COVID-19 as of 15 days after such a service or vaccine is given an "A" or "B" rating in a recommendation by the U.S. Centers for Disease Control and Prevention (CDC) or U.S. Preventive Services Task Force.

Additional Guidance

On April 11, 2020, the FFCRA and CARES Act FAQs provided additional information about this COVID-19 mandate. Items included details on required coverage of COVID-19 antibody tests, rules regarding required disclosures of the new coverage to plan participants, and which items and services related to COVID-19 testing must be covered by a plan.

Continuation of Health Benefits During Certain Leaves of Absence (Mandatory)

The FFCRA also requires (with some exceptions) employers with fewer than 500 employees to provide certain paid sick leave and family and medical leave related to certain COVID-19 reasons, as follows:

Paid sick leave. An applicable employer must provide two weeks of emergency paid sick leave (EPSL) to an employee who is unable to work (or telework) due to certain reasons related to COVID-19. Reasons include quarantining of an employee (due to a Federal, state or local order or advice from a health care provider) experiencing COVID-19 symptoms, caring for an individual who is quarantined, and caring for a child under age 18 whose school or child care provider is closed.

Family and medical leave. The employer must also provide up to twelve weeks of expanded Family Medical and Leave Act (FMLA) leave (ten of which is paid) for an employee who has been employed for at least 30 days and who is unable to work (or telework) due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

During FMLA leave, an employer is required to allow the employee to continue his or her group health coverage at the same premium rate as that of active employees. The DOL has also issued FAQs stating that employers must continue employees' coverage during EPSL, as well. Note, there are also implications for retirement plans under the FFCRA and CARES Act. Although those retirement plan rules are not discussed in this article, some of the CARES Act rules are conceptually similar for retirement plans (e.g., 401(k) plans may allow participants to take "Coronavirus-related" 401(k) plan distributions due to certain COVID-19 reasons).

High-Deductible Health Plans and Health Savings Accounts (Optional)

IRS Guidance

IRS Notice 2020-15 (March 11, 2020), which was issued prior to passage of the FFCRA and CARES Act, provided that a high-deductible health plan (HDHP) will not lose its HDHP status if it covers COVID-19 testing and treatment before the statutory minimum HDHP deductible is met. Therefore, the plan can cover those COVID-19 related services without causing participants to be ineligible to contribute to a health savings account (HSA). IRS Notice 2020-29 (May 12, 2020) clarified that the provisions in Notice 2020-15 apply to an HDHP's reimbursement of expenses incurred on and after January 1, 2020.

CARES Act

The CARES Act amended the HSA rules to provide that, for plan years before December 31, 2021, an HDHP does not lose its HSA-eligible status if it covers telehealth and other remote healthcare services before the HDHP deductible is met. This CARES Act provision is broader than the IRS Notices, as it provides that an HDHP can cover telehealth services regardless of whether the services are related to COVID-19. The CARES Act also allows participants to use their HSAs, health flexible spending accounts (FSAs), and health reimbursement arrangements (HRAs) to pay for certain over-the-counter drugs without a prescription as well as certain menstrual care products.

Extended Form 5500 Filing Deadline for Certain Plans (Optional)

IRS Notice 2020-23 (April 9, 2020) extended certain deadlines for a plan to file the required annual Form 5500. Under Notice 2020-23, the Form 5500 deadline was extended to July 15, 2020 for any plan whose plan year ended in September, October, or November 2019 (or any plan that was given a filing extension between April 1 and July 15, 2020). Ordinarily, a plan must file its Form 5500 (absent an extension) by the last day of the seventh month following the end of the plan year.

Relief for Certain Disclosures Required by ERISA (Optional)

EBSA Disaster Relief Notice 2020-01, which was issued by the DOL on April 28, 2020, extended the deadlines for plans to provide certain notices and disclosures under Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Under Notice 2020-01, a plan will not be treated as violating ERISA if it fails to timely furnish a notice, disclosure, or document required by Title I of ERISA between March 1, 2020 and 60 days after the announced end of the national emergency declaration for COVID-19. The plan fiduciary, however, must act in good faith to furnish the notice, disclosure, or document as soon as administratively practicable. For this purpose, a plan fiduciary can meet the "good faith" standard by furnishing a document electronically if it reasonably believes that the recipient has access to electronic communication.

Extensions of Certain Plan Deadlines (Mandatory)

A joint notice issued by the DOL and IRS (published May 4, 2020) required group health plans to extend certain timeframes for participants during the "outbreak period" (defined as the period from March 1, 2020 until 60 days after the announced end of the national emergency for COVID-19). Those plans are required to disregard the outbreak period for purposes of determining the following periods and dates:

> The 30-day/60-day special enrollment period under the Health Insurance Portability and Accountability Act (HIPAA).
>
> The 60-day deadline for a qualified beneficiary to elect continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).
>
> The deadlines for a COBRA qualified beneficiary to pay his or her required COBRA premiums.
>
> The deadline for an individual to notify the plan of COBRA certain qualifying events (e.g., divorce).
>
> The deadlines for a participant to file benefit claims, appeals, and external review requests with the plan (or to perfect an external review request).

Because of this joint notice, a group health plan must essentially "pause" the above deadlines during the outbreak period. For example, if an individual experienced a COBRA qualifying event on March 1, 2020, the individual would have until 60 days after the end of the outbreak period (rather than 60 days after March 1) to elect COBRA coverage. This is because the joint notice requires a group health plan to pause the 60-day timeframe for COBRA elections during the outbreak period. Also, because the joint notice was issued on May 4 and is retroactive to March 1, plans may be required to re-process previous claim denials that were based on a participant's failure to meet one of the above deadlines between March 1 and May 4.

Cafeteria Plans and Flexible Spending Accounts (Optional)

2020 Midyear Election Changes

IRS Notice 2020-29 (May 12, 2020) relaxed the rules regarding cafeteria plan pre-tax elections in light of the COVID-19 pandemic. Under Notice 2020-20, employers may (but are not required to) amend their cafeteria plans to allow participants to make the following mid-year, pre-tax election changes in 2020:

> An election to enroll in the health plan by an eligible employee who previously declined coverage (e.g., someone who waived coverage during open enrollment).

An election to change plan options (e.g., from an HMO to a PPO) or add dependents

An election to drop coverage by a participant.

An election to enroll in or drop health FSA or dependent care FSA coverage or to increase or decrease health FSA or dependent care FSA contributions.

An employer that wishes to adopt any of all of the above cafeteria plan changes must disclose the changes to employees and amend its cafeteria plan by no later than Dec. 31, 2020 (i.e., an amendment is not required in advance of making the changes).

Extended Grace Period to Incur FSA Claims and Increase of Maximum Health FSA Carryover Amount

Notice 2020-29 also permits employers to amend their health and dependent care FSAs to allow employees to incur eligible claims through the end of the 2020 calendar year for any FSA plan year (or for any FSA grace period that ends in 2020). For example, if a health FSA has a grace period until March 15, 2020 for a participant to incur eligible claims for the 2019 plan year, the FSA can allow participants to incur expenses through 2020 and use their 2019 elections to pay for those expenses.

This change does not apply to FSAs with a carryover provision. IRS Notice 2020-33 (May 14, 2020), however, provides for a permanent FSA carryover increase based upon annual indexing. For the 2020 plan year, employers may amend a cafeteria plan with carryover provision to allow participants to carry over up to $550 in unused health account balances in the 2021 plan year. An employer that adopts the extended FSA grace periods or the increased carryover limit must amend its cafeteria plan or FSA (as applicable) by no later than December 31, 2021.

Tax-Free Payment of Employees' Student Loans (Optional)

The CARES Act amended Section 127 of the Internal Revenue Code (education assistance programs) to permit employers to pay up to $5,250 of an employee's student loans on a tax-free basis. This provision applies from the date of enactment of the CARES Act (March 27, 2020) through the end of 2020. The payment must be for either the principal or interest of a qualifying education loan incurred by the employee, and the employer can make payment either directly to the lender or as a reimbursement to the employee.

Takeaways for Employers

As employers grapple with the impact of the COVID-19 pandemic and return to normal business operations, it is important for them to be aware of their compliance obligations under the FFCRA, CARES Act and other guidance issued by governmental agencies.

Employers should also carefully review the guidance and legislation for potential avenues of benefit for their business and employees.

Additional guidance for both mandatory and optional items is likely forthcoming as well, and COVID-19 continues to have a major impact on both companies and individuals as new infections spike in numerous states. Accordingly, employers would be well-advised to keep a close eye out for new legislation and guidance in the coming months and periodically evaluate their benefits programs for compliance and competitive considerations.

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